89-1586

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

NO. _____

LUKE ALLEN BATES,
Petitioner

versus

STATE OF ALABAMA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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QUESTIONS PRESENTED

I. Whether or not the Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were violated when the Honorable Trial Court failed to declare a mistrial after a prospective juror admitted before the entire jury panel that he had previously arrested the Petitioner. *United States Constitution, Amendment Five, Six, and Fourteen.*

II. Whether or not the Petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were violated by the State's failure to comply with Petitioner's motion for exculpatory evidence. *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

III. Whether or not the Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated by his sentence under the Alabama Habitual Felony Offender Act. *United States Constitution, Amendment Eight* and *Fourteen.*

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2. The decision of the Alabama Court of Criminal Appeals affirming, without opinion, the judgement of the trial court and the subsequent denial of Petitioner's Petition for Certiorari is in conflict with a prior decision of the Supreme Court of the United States and with the Fifth and Fourteenth Amendments to the United States Constitution with regard to due

process as well as with the Sixth Amendment to the United States Constitution concerning a fair trial.

3. The decision of the Alabama Court of Criminal Appeals affirming, without opinion, the trial court and the subsequent denial of Petitioner's Petition for Certiorari is in conflict with Petitioner's Constitutional rights under the Eighth Amendment to the United States Constitution with regard to cruel and unusual punishments and the Fourteenth Amendment to the United States Constitution with regard to due process and equal protection of the law.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term,
NO.

LUKE ALLEN BATES
Petitioner

versus

STATE OF ALABAMA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

The Petitioner, Luke Allen Bates, respectfully prays that a Writ of Certiorari issue to the review the judgement of the Supreme Court of Alabama entered in this proceeding January 26, 1990.

OPINION BELOW

The judgement of the Court of Criminal Appeals of Alabama was rendered without opinion on September 29, 1989, affirming Petitioner's conviction in the trial Court. Application for Rehearing was filed within fourteen (14) days of that date and was overruled by the Alabama Court of

Criminal Appeals without opinion on December 1, 1989. A Petition for Writ of Certiorari to the Court of Criminal Appeals was filed with the Alabama Supreme Court within fourteen days of December 1, 1989. The Petition for Writ of Certiorari was denied without opinion on January 26, 1990.

JURISDICTION

The Petition for Writ of Certiorari to the Court of Criminal Appeals of Alabama was denied by the Supreme Court of Alabama on January 26, 1990. The Court of Criminal Appeals of Alabama granted a stay of execution of judgement for sixty (60) days from January 26, 1990, in order for Petitioner to effect a Petition for Writ of Certiorari to the Supreme Court of the United States. This Petition for Writ of Certiorari was filed within sixty (60) days of that date. The Court's jurisdiction is invoked under 28 U. S. Code Sec. 1257 (3).

STATEMENT OF THE CASE

Detective Danny Cox and Officer Robert Nance of the Huntsville (Alabama) Police Department arrived at 2004 First Street in Huntsville, Alabama at approximately 9:10 p.m. on June 28, 1986, after they were dispatched to the scene of an alleged shooting. After arrival at the scene, they noted that the area had been secured by other officers of the Huntsville Police Department and that the body of Anthony Smith had been removed from the street by paramedics and ambulance personnel for transfer to a hospital for medical treatment. Officer Nance photographed the scene and he and

Detective Cox proceeded to the hospital to attempt an interview with Anthony Smith. In route to the hospital, Officer Nance and Detective Cox encountered the ambulance personnel and paramedic who had attended to Anthony Smith at the scene of the shooting. During this encounter, the paramedic gave Officer Nance a pocket knife, which, he indicated, had been given to him by a witness who had found the knife under the body of Anthony Smith at the scene on First Street. Detective Cox and Officer Nance then proceeded to the hospital where they discovered that Anthony Smith had died from gunshot wounds.

A subsequent investigation into the shooting of Anthony Smith revealed that he and Kenneth Bates, the Petitioner's son, had suffered a longstanding adversarial relationship: Kenneth Bates lived with an ex-girlfriend of Anthony Smith. The two men had seen each other earlier in the day of June 28, 1986; they had argued; and, Kenneth Bates had fled from Anthony Smith. According to Kenneth Bates, he had experienced numerous prior difficulties with Anthony Smith prior to Smith's death; Smith had previously threatened to kill Kenneth Bates on several occasions; he knew Smith to always carry a knife; and, he was "terrified" of Anthony Smith. The investigation revealed that Kenneth Bates lived in a house at 2004 First Street, and that he had requested his father, the Petitioner, to assist him in moving his belongings from that house on June 28, 1986. Kenneth Bates met his father, the Petitioner, at his house early in the evening on that date: when Kenneth arrived, his father was parked in front of his residence in his van. Also at that

scene when Kenneth arrived was Anthony Smith. Smith was on the sidewalk between the Petitioner's van and Kenneth's house. Kenneth testified that he anticipated trouble so he retrieved a baseball bat from the back seat of his car, got out of his car and began walking towards his residence. At that time, Anthony Smith advanced upon him and a fight ensued. Anthony Smith was bigger and stronger than Kenneth Bates. Kenneth called for assistance from his father. Petitioner got out of his van and approached the two men who were still fighting in the street in front of Kenneth Bates' residence. As the Petitioner approached the men, two shots were fired and Anthony Smith fell to the ground. The Petitioner and Kenneth Bates fled the scene.

At trial, Brent Wheeler, a firearms expert, testified that he examined a bullet which was recovered from the body of Anthony Smith and determined that it was a .22 caliber bullet. He stated that the gun powder particles which were removed from the body of the victum indicated that shots were fired from a distance of three to four feet.

Also, at trial, Debbie Holsclaw, a registered nurse who lived on First Avenue, testified that she performed artificial respiration on the victim at the scene immediately after the shooting. She testified that she administered to him during the entire period until the ambulance and paramedics arrived. After the victim's body was removed from the scene by paramedics, Ms. Holsclaw observed a knife under the body of Anthony Smith, retrieved it, and handed it to the paramedics. She admitted that she had participated in an interview with the District

Attorney's Office concerning this situation and had advised that office of the existence of the knife.

At trial, Petitioner was convicted on January 29, 1988, for manslaughter. Petitioner was sentenced to twenty years imprisonment in the state penitentiary on April 15, 1988. On April 15, 1988, the case was appealed to the Alabama Court of Criminal Appeals which affirmed the conviction on September 29, 1989. Application for rehearing was overruled on December 1, 1989. Petitioner submitted a Petition for Writ of Certiorari to the Supreme Court of Alabama and that Petition was denied on January 26, 1990.

REASONS FOR GRANTING THE WRIT

1. The decision of the Alabama Court of Criminal Appeals, affirming, without opinion, the trial court and the subsequent denial of Petitioner's Petition for Writ of Certiorari is in conflict with Petitioner's Constitutional Rights under the Fifth Amendment to the United States Constitution with regard to due process, the Sixth and Fourteenth Amendments to the United States Constitution with regard to equal protection of laws.

Petitioner respectfully asserts that he was denied a trial by an impartial jury because the entire panel was tainted by a prespective juror's response to a question posed by the trial court during voir dire that he had previously arrested Petitioner.

At Petitioner's trial, the entire panel of prospective jurors was questioned as a group by the trial court concerning their qualifications to serve as jurors. Specific voir dire questions were then posed to the entire panel by the trial court during which the following occured:

> "THE COURT: Do any of you know either defendant or any members of their families socially or through business relationships or in any other way?
>
> All right, Tommy Cheatham. Which of the defendants do you know, Tommy?
>
> PROSPECTIVE JUROR CHEATHAM: Luke.
>
> THE COURT: Luke. Is that social or business?
>
> PROSPECTIVE JUROR CHEATHAM: I arrested him one time.
>
> AND:
>
> THE COURT: Now, Tommy, let me ask you this question. Would the relationship that you have described in any way affect your verdict if you were selected to serve as a member of this jury, or could you put it out of your mind and render a fair, impartial verdict based solely upon the evidence that you would see and hear in this courtroom and my instructions on the

law and nothing else, giving no weight or conisderation to your prior relationship?

PROSPECTIVE JUROR CHEATHAM: Under the circumstances that I know him, I don't think so, sir." (r 7-8).

After the Court's qualifying questions to the jury venire, the following occurred:

"THE COURT: Okay, Randy, did you want to take up something outside the presence of the jury?

MR. GLADDEN: Yes, your Honor. At this time, I think we may have a problem with some responses which Tommy Cheatham, a potential juror, has given the Court. I don't think that Tommy meant to do anything that might prejudice anything. I think he thought he was answering a question that you asked the jury panel. However, Mr. Cheatham, in response to your question as to how he knew the defendant, Luke Bates, whether it was a business or a social manner, answered that he knew him because he had arrested him before. It would be my contention that that response has tainted this jury panel. I intended not to put my client, Luke Bates, on the stand for the simple reason that he did have some prior arrests and prior convictions.

I think this panel might have been

tainted by those statements by Tommy, especially not knowing, or not having known - the rest of the panel not knowing, rather, what the arrest was all about, whether it was a traffic arrest or something to do with this case or something like that, and I guess at this point, your Honor, I would have to ask for another jury panel.

THE COURT: What are you moving for? A mistrial?

MR. GLADDEN: As it stands right now, unless something can be cleared up about his answers to the voir dire question from the Court, I think that I would have to ask for a mistrial.

THE COURT: Well, of course, Tommy Cheatham is a State Trooper.

MR. GLADDEN: Yes, sir.

THE COURT: And the odds are that the arrest was a traffic offense.

MR. GLADDEN: Yes, sir.

THE COURT: Does Mr. Bates recall what the arrest was for?

MR. GLADDEN: No, sir, he doesn't.

THE COURT: Larry, why don't you go and run Tommy Cheatham down and just bring

him into the courtroom, please, sir?

MR. SMITH: All right, sir.

(Whereupon, Mr. Smith left the courtroom and the following occurred:)

THE COURT: Randy, assuming that the arrest to which Mr. Cheatham referred was not a traffic offense, would it satisfy your objection if I examined the jurors as to whether that comment would have any effect on their ability to sit fairly and impartially in this case? They understand that every defendant who comes into a court of law charged with a crime is presumed innocent. That's a fact in the case that they must take into account and that they must not give any weight or consideration to any other matters other than the evidence and the law that apply to this case.

MR. GLADDEN: Your Honor, I think it probably could work out that way if it can be conveyed to the jury, to the potential jurors, that in some way this was a minor infraction for which he was arrested and no major charge and not referring to it being an assault on a police officer, assuming that's what the charge turns out to be.

(Whereupon, Prospective Juror Cheatham entered the courtroom and the

following occured:)

THE COURT: Tommy, come up.

PROSPECTIVE JUROR CHEATHAM: Yes, sir.

THE COURT: Let the record reflect that this is Potential Juror Tommy W. Cheatham, No. 18 on the strike list.

Tommy, you referred to having arrested Defendant Luke Allen Bates. How long ago was that?

PROSPECTIVE JUROR CHEATHAM: I would approximately say fifteen years.

THE COURT: All right. Was it for a traffic offense?

PROSPECTIVE JUROR CHEATHAM: This is the same Luke Bates that I recall, brother of Paul Bates. It was a situation involving an assault and that kind of thing at a place over here on Dallas Avenue that don't even exist any more.

THE COURT: Were you an Alabama State Trooper at that time?

PROSPECTIVE JUROR CHEATHAM: No, sir. I was a city officer.

THE COURT: Was it a misdemeanor

offense?

PROSPECTIVE JUROR CHEATHAM: Yes, sir.

THE COURT: Did the arrest result in a conviction?

PROSPECTIVE JUROR CHEATHAM: Yes, sir, I believe it did. It's been a long time. And at the same time, I arrested his brother, Paul.

THE COURT: Was the offense a violation of an ordinance of the City of Huntsville?

PROSPECTIVE JUROR CHEATHAM: I'm not sure where we charged him under ordinance or State law at the time. Let's see. It was an assault on me as a police officer and Act 746, Section 2, which is a State act, and resisting arrest appears. He was found guilty, a $25 fine and court costs. It happened in '72. And the resisting arrest was nol prossed, I believe, on a plea.

THE COURT: So that was sixteen years ago.

PROSPECTIVE JUROR CHEATHAM: Yes, sir. It's got a date here of conviction as 8/25 of '72. It was prior to that.

THE COURT: So the punishment was a $15 fine.

PROSPECTIVE JUROR CHEATHAM: 8/18 /72 I believe was the date arrested.

I'm sorry, sir?

THE COURT: Punishment was a $15 fine?

PROSPECTIVE JUROR CHEATHAM: A $25 fine and court costs.

THE COURT: Twenty-Five.

PROSPECTIVE JUROR CHEATHAM: And, at the same time, his brother was arrested and his parole was violated for coming up behind me with a baseball bat. They sent him back to the penitentiary.

MR. GLADDEN: I'm sorry. I didn't hear that. What?

PROSPECTIVE JUROR CHEATHAM: At the same time, his brother, Paul, was arrested. He come up behind me with a baseball bat, and he was paroled -- I mean he was sent back to prison. It was a violation of parole, I believe. I believe Paul died in jail.

THE COURT: Have you discussed this arrest or situation in any way with any of the other jurors?

PROSPECTIVE JUROR CHEATHAM: No, Sir.

THE COURT: Outside of this courtroom, either before coming in or during the recess we've just taken?

PROSPECTIVE JUROR CHEATHAM: No, sir. I didn't even know who the defendants were before we got in here.

THE COURT: Tommy, do not discuss this with anyone else during the conduct of this trial.

PROSPECTIVE JUROR CHEATHAM: Okay." (R 21-26).

Following the examination of prospective juror Tommy Cheatham by the trial court and cousel for both defendants, the trial court instructed the entire jury panel as follows:

"THE COURT: Now, ladies and gentlemen, I have a question, a very important question that I need to ask of you, but I need to tell you some things first. Listen very carefully to what I'm about to say to you.

Now, as some of you may have realized during my questioning of you earlier, one of your number, Tommy Cheatham, who is an Alabama State Trooper, made reference to the fact that at some time in the past he had arrested Defendant Luke Allen Bates. As it turns out on further examination, that arrest occurred some

fifteen or sixteen years ago. It was for a misdemeanor offense, and it resulted only in a $25 fine and court costs.

But that statement, I want to make absolutely sure that that statement has not in any way biased or prejudiced any of you against the defendant at this point in time for this reason: because the fact that he had been arrested some fifteen to sixteen years ago for a misdemeanor and convicted of it and fined $25 in no way has any bearing on the issues of this case. The fact that Mr. Luke Allen Bates and Mr. Kenneth Bates have been indicted is not evidence in this case against them. An indictment provides no proof, no presumption, nor any inference that either of the defendants is guilty of the offense charged in them or any lesser included offense that might arise by operation of law.

Rather, an indictment of a grand jury merely is the formal method under our judicial procedure by which a person is charged with a crime. It is similar to a complaint that's filed by a plantiff in a civil case, and it's just the first step in bringing these cases here before twelve citizens for trial so that twelve good citizens of this county may hear the evidence that applies to this case and the law that applies to these two consolidated cases and determine whether either or both of the

defendants is in fact guilty of any of the charges against them.

The defendants have said that they are not guilty. That plea of not guilty has the legal effect of placing the burden of proof upon the prosecution. The State has the burden of proving by the evidence beyond a reasonable doubt every essential element of one of the crimes charged against these defendants. The burden of proving every essential element of one of the crimes charged remains on the State throughout the trial. It never shifts. A defendant has the right to rely upon a failure of the prosecution to establish the required degree of proof. A defendant may also rely upon evidence which his attorneys bring out on his behalf either by cross-examination or the State's witnesses as well as any evidence which the defendant may present on his own behalf if any.

But a defendant is not required to present any evidence on his behalf. Rather, a defendant, under our system of law, is presumed to be innocent of the charges against him, and the burden of proving him guilty is upon the State. The presumption of innocence is no mere cliche, ladies and gentlemen. The presumption of innocence is a fact in this case which jurors who sit in it must take into account. The presumption of innocence remains with

each of the defendants throughout every stage of the trial and during a jury's deliberations on a verdict, and it is not overcome unless a point is reached where twelve members of the jury are unanimously satisfied beyond a reasonable doubt that the defendant has been proven guilty of one of the offenses charged against him by the evidence.

Now, bearing that in mind, ladies and gentlemen, the question I have to you is this: Would any of you be biased or prejudiced against Defendant Luke Allen Bates or Kenneth Bates in any way whatsoever as a result of the remark that was made by Mr. Cheatham earlier in the jury selection? If so, please raise your hand and let us know that.

(No response.)

THE COURT: Now, this is very important. If any of you feel that you would be affected in any manner to any degree by that remark in your ability to fairly weigh and sift the evidence and the law in this case, we need to know that.

(No response.)" (R 31-33).

Notwithstanding the trial court's attempts to cure the effects of prospective juror Cheatham's response that he had previously arrested one of the defendants, the entire panel was tainted and

Petitioner's motion for a mistrial should have been granted. It is a fundamental legal principle that a defendant's prior arrests may not be introduced into evidence against him during a trial for any reason.

This Honorable Court held in *Turner v. State of Louisiana,* 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d. 424 (1965), that:

> "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

Further, this Honorable Court held in *Nebraska Press Association v. Stewart,* 427 U.S. 539, 49 L.Ed.2d 683, 96 S.Ct. 2791 (1976), as follows:

"The Sixth Amendment in terms guarantees 'trial by an impartial jury...' in federal criminal prosecutions. Because 'trial by jury in criminal cases is fundamental to the American scheme of justice,' the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions. *Duncan v. Louisiana,* 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968).

> 'In essence, the right to jury trial guarantees to the criminally accused a fair

> trial by a panel of impartial, "indifferent" jurors. . . . "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." Co.Litt. 155b. His verdict must be based upon the evidence developed at the trial. *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961)."'

In conclusion, Petitioner respectfully maintains that the potential juror's response eliciting "evidence" of a prior arrest undermined his right to a trial by an impartial jury in violation of his constitutional rights. Petitioner, therefore, respectfully requests this Honorable Court to grant his Petition for Writ of Certiorari.

> 2. The decision of the Alabama Court of Criminal Appeals affirming, without opinion, the trial court and the subsequent denial of Petitioner's Petition for Certiorari is in conflict with a prior decision of the Supreme Court of United States and with the Fifth and Fourteenth Amendments to the United States Constitution with regard to due process as well as with the Sixth Amendment to the United States Constitution concerning a fair trail.

Petitioner contends that the failure by the district attorney to fully comply with an order in response

to the petitioner's motion to produce exculpatory evidence was a denial of his right not to be deprived of liberty without due process of law. He further contends that he was prejudiced to his ultimate detriment by the state's failure to respond to that order.

On January 22, 1987, the petitioner, by counsel, filed a motion for production and disclosure. In that motion, the Petitioner requested, among other things, so called "Brady" material. The Petitioner requested,

> "Any and all material in the possession of the prosecution, or which, through due diligence, may be learned from the state or other sources, which might exculpate the defendant, negate the charge against him, lead to a reasonable doubt about his guilt, or otherwise be favorable to him."

Further, the Petitioner requested,

> "Any and all material know to the prosecutor, or which, through due diligence, could become known to the prosecutor, which is arguably exculpatory in nature." (R 643).

In response to the Petitioner's aforementioned motion, the trial court entered its discovery order on January 23, 1987. That order compels the district attorney to supply to the Defendant any so-called "Brady" material. (R 647). In response to the discovery order of the court, the district attorney

supplied to both defendants a package of materials containing, among other things, police investigative reports, arrest records of the defendant Luke Bates, and numerous reports of the Department of Forensic Sciences. (R 662-707)

During the trial of this case and after the state had rested its case and the Petitioner had begun producing his evidence, Debbie Epps Holsclaw testified among other things that she was a registered nurse who lived near the location where the victim was shot and that she arrived on the scene immediately after he was shot and attempted to revive him. She testified that during her attempts to revive the victim that she was present when the paramedics removed his body. She testified that she found a knife under the body of the victim and attempted to give the knife to one of the officers. She testified that the knife was slightly opened at the time she found it. She informed the District Attorney of all these matters.

> "A: No, I told them I found it underneath the body and tried to give it to one of the officers. He wouldn't take it. And I asked if it belonged to them, and they took it from there.
>
> Q: Now, the State, Laura Jo Hamilton, had subpoenaed you to testify in this case; had she not?
>
> A: Yes, sir.
>
> Q: And how many times did you talk to her

about this case?

A: Twice.

Q: Was that on the telephone or face to face?

A: Here in the courthouse.

Q: Here in the courthouse. You talked to her twice.

A: Yes, sir.

Q: Did you also talk to her about it on the telephone?

A: One time we talked just briefly when she was wanting me to come in the first time.

Q: Did you inform Mrs. Hamilton of these details?

A: Yes, sir.

Q: As to where the knife was found?

A: Yes, sir.

Q: What you tried to do with it?

A: Yes, sir.

Q: And she was fully aware of that then?"

(R 425)

After Ms. Holsclaw's testimony, the attorney for the defendant Luke Bates made a motion for a mistrial because of the failure of the State to comply with the Court order to disclose exculpatory enidence. That motion was denied. (R 442). The motion was renewed after the verdict was returned in this matter and full arguments were conducted on the motion. The district attorney replied that,

> "In my opinion it was not 'Brady' material and, therefore, I did not feel compelled to reveal that to him because in my opinion, it in no way was connected to the victim. My knowledge of the situation at the time that I learned of that fact led me to the conclusion that it in no way was exculpatory or could have been beneficial in determining or favorable to the defendant," (R 61).

The Petitioner's motion which was made after the verdict was also denied.

It is important to note that the material supplied the Petitioner pursuant to the Court's order contains a reference to a knife being turned over to one of the ambulance drivers and consequently from the ambulance driver to Inv. Nance of the police department. No where in the police reports or in any of the other discovery material is the name of the witness who discovered the knife revealed. (R 664).

In *Brady v. Maryland*, 373 U.S. 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), this Honorable Court held as

follows:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution."

The Court further held in *Brady* that, "a prosecution that withholds evidence on demand of an accused which, if made available would tend to exculpate him or reduce the penalty help shape a trial that bears heavily on the defendant."

The withholding of the knife found at the scene in the instant case seriously prejudiced the Petitioner's ability to adequately advance his self-defense argument in this matter. Therefore, Petitioner contends that his Petition for Writ of Certiorari should be granted in this case.

> 3. The decision of the Alabama Court of Criminal Appeals affirming, without opinion, the trial court and the subsequent denial of Petitioner's Petition for Certiorari is in conflict with Petitioner's Constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution concerning due process and cruel and unusual punishment.

Petitioner respectfully contends that at his sentencing in this cause, the State of Alabama

failed to prove the existence of a prior felony conviction for the purpose of sentence enhancement under the Alabama Habitual Felony Offender Act. Petitioner further contends that the Court erred in recognizing a tendered conviction for the purpose of said enhancement.

Code of Alabama, 1975, Sec. 13A-5-9 provides for punishment of reserviced or habitual felony offenders as follows:

> "(a) In all cases when it is shown that a criminal defendant has been previously convicted of any felony and after such conviction has committed another felony, he must be punished as follows:
>
> (1) On conviction of a Class C felony, he must be punished for a Class B felony;
>
> (2) On conviction of a Class B felony, he must be punished for a Class A felony;
>
> (3) On conviction of a Class A felony, he must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years.
>
> (b) In all cases when it is shown that a criminal defendant has been previously convicted of any two felonies and after such convictions has committed another

felony, he must be punished as follows:

(1) On conviction of a Class C felony, he must be punished for a Class A felony;

(2) On conviction of a Class B felony, he must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years;

(3) On conviction of a Class A felony, he must be punished by imprisonment for life or for any term of not less than 99 years.

(c) In all cases when it is shown that a criminal defendant has been previously convicted of any three felonies and after such convictions has committed another felony, he must be punished as follows:

(1) On conviction of a Class C felony, he must be punished by imprisonment for life or for any term not more than 99 years but not less than 15 years;

(2) On conviction of a Class B felony, he must be punished for life in the penitentiary;

(3) On conviction of a Class A felony, he must be punished by imprisonment for life without parole. (Acts 1977, No. 607, P. 812, Sec. 1235; Acts 1979, No.

79-664, p. 1163, Sec. 1.)"

The Petitioner was sentenced to twenty years in the state penitentiary on April 15, 1988, after a sentencing hearing in which the trial court considered one prior felony conviction for purposes of sentence enhancement. Petitioner contends that the tendered docket entry which the court recognized as a prior valid conviction was insufficient in that nowhere on the face of the document does it appear that Petitioner was represented by counsel at the time of the conviction. The docket sheet is not a part of the record but is characterized by defense counsel as follows:

> "Judge, the page I'm looking at right now has got the number 270 up in the left-hand corner. It's a typewritten sheet and it's got the State of Alabama vs. Luke Bates, Paul Bates, and Willie Waye. The first sentence indicates that on May 19, all the defendants were in court. It says, 'Luke Bates and Paul Bates, each in his own person and by his attorney.' The word, 'his,' is a singular, and I'm not sure that means anything or not, but when you get down to midway through the thing, it says, Thereupon, the defendant, Luke Bates, moves the Court for a severance and the severance was granted. He was then arraigned in open court and entered a guilty plea. It makes no reference throughout the rest of this exhibit that Mr. Bates had an attorney at that sentencing either. On the next page, the proceeding of May 31st,

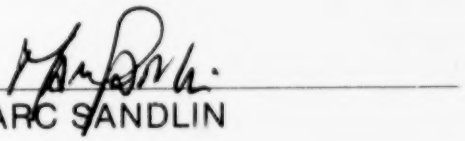
> 1960, does not indicate that Mr. Bates had an attorney that accompanied him at these proceedings." (R 625-626).

In conclusion, Petitioner contends that he was improperly sentenced under the Alabama Habitual Felony Offender Act because the State failed to prove that his prior felony convictions were obtained while the the Petitioner was represented by counsel. Thus, Petitioner requests that his Petition for Writ or Certiorari be granted.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Alabama.

Respectfully submitted,



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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

NO. _____

LUKE ALLEN BATES
Petitioner

versus

STATE OF ALABAMA
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

AFFIDAVIT OF PROOF OF SERVICE

State of Alabama County of Madison

I, the undersigned, Marc Sandlin, 313 Franklin Street, Huntsville, Madison County, Alabama 35801, hereby certify that I have deposited for service three (3) copies of a Petition for Writ of Certiorari to the Honorable Don Siegleman, the Attorney General for the State of Alabama, Montgomery, Alabama, and forty (40) printed copies to the Clerk of the Supreme Court of the United States.

This the 9 day of ~~March~~ April, 1990.

MARC SANDLIN

Attorney At Law
313 Franklin Street
Huntsville, Alabama 35801
(205) 534-3018

State of Alabama County of Madison

Subscribed and sworn to before me on this 9 day of ~~March~~ April, 1990.

NOTARY PUBLIC

My commission expires the 15 day of October, 1990.

APPENDIX A

United States Constitution, Amendment V

> "No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

United States Constitution, Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence."

Unites States Constitution, Amendment VIII

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution, Amendment XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. Box 351
Montgomery 36101

SAM TAYLOR
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
(205) 261-4590

8th Div. 80 MADISON Circuit Court
CC 86-1191FL

LUKE ALLEN BATES (Appellant) vs. State of Alabama (Appellee)

Dear Sir:

You are hereby notified that on September 29, 1989 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

____ Notice of Appeal filed. Future correspondence should refer to the above number.

____ Record on Appeal filed. Date of Certification of Completion of Record on Appeal: _____ As to briefs, see Rules 28, 31 and 32, A.R.A.P.

____ On motion, record on appeal accepted and considered as timely filed in this Court.

____ Appellant granted seven (7) additional days to file brief. Brief due on _____.

____ Appellee granted seven (7) additional days to file brief. Brief due on _____.

____ Appellant granted seven (7) additional days to file **reply** brief. Brief due on _____.

____ Brief of Appellant filed. ____ Oral argument requested by appellant.

____ Reply brief filed.

____ Oral argument request disallowed; appeal submitted on briefs.

____ Appeal submitted to the Court for decision in the following manner:

XXX **Affirmed** on appeal. **No opinion**. Judgment not final, see Rules 40 and 41, A.R.A.P.

____ Appeal **dismissed. No Opinion**.

____ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

____ Application for rehearing filed.

____ Application for rehearing **overruled. No opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

____ Application for rehearing **overruled**. Rule 39(k), A.R.A.P., motion **denied. No opinion**. Judgment not final, see Rules 39 and 41, A.R.A.P.

____ Application for rehearing returned for noncompliance with Rule 40, A.R.A.P.

____ Appeal placed on rehearing **ex mero motu**.

____ Certificate of final judgment issued to circuit clerk.

___

Mollie Jordan
CLERK
COURT OF CRIMINAL
APPEALS OF ALABAMA

APPENDIX C

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P.O. Box 351
Montgomery 36101

SAM TAYLOR
Presiding Judge
JOHN C. TYSON, III
WILLIAM M. BOWEN, JR.
JOHN PATTERSON
H. WARD McMILLAN
Judges

MOLLIE JORDAN
Clerk
(205) 261-4590

8th Div. 80 MADISON Circuit Court
CC 86-1191FL

LUKE ALLEN BATES (Appellant) vs. State of Alabama (Appellee)

Dear Sir:

You are hereby notified that on December 1, 1989 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

____ Notice of Appeal filed. Future correspondence should refer to the above number.

____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____ As to briefs, see Rules 28, 31 and 32, A.R.A.P.

____ On motion, record on appeal accepted and considered as timely filed in this Court.

____ Appellant granted seven (7) additional days to file brief. Brief due on _____.

____ Appellee granted seven (7) additional days to file brief. Brief due on _____.

____ Appellant granted seven (7) additional days to file **reply** brief. Brief due on _____.

____ Brief of Appellant filed. ____ Oral argument requested by appellant.

____ Reply brief filed.

____ Oral argument request disallowed; appeal submitted on briefs.

____ Appeal submitted to the Court for decision in the following manner:

____ **Affirmed** on appeal. **No opinion**. Judgment not final, see Rules 40 and 41, A.R.A.P.

____ Appeal **dismissed. No Opinion**.

____ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

____ Application for rehearing filed.

____ Application for rehearing **overruled. No opinion.** Judgment not final, see Rules 39 and 41, A.R.A.P.

XXX Applications for rehearing **overruled**. Rule 39(k), A.R.A.P., motions **denied. No opinion**. Judgment not final, see Rules 39 and 41, A.R.A.P. (FILED BY APPELLANT **AND** APPELLEE

____ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

____ Appeal placed on rehearing **ex mero motu**.

____ Certificate of final judgment issued to circuit clerk.

Mollie Jordan
CLERK
COURT OF CRIMINAL
APPEALS OF ALABAMA

APPENDIX D

STATE OF ALABAMA — JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

January 26, 1990

89-436

Ex parte Luke Allen Bates

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Luke Allen Bates v. State)

(CCA 8/80 (Madison CC-86-1191))

CERTIFICATE OF JUDGEMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

KENNEDY, J. - Hornsby, CJ., Jones, Shores and Houston, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out a same appear(s) of record in said court.
Witness my hand this 26 day of Jan 19 90

Clerk, Supreme Court of Alabama